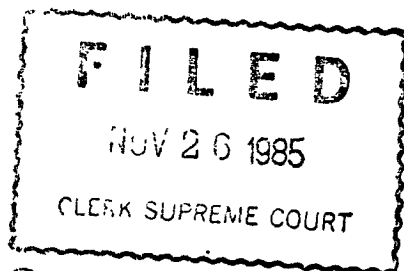


IN THE COURT OF APPEALS OF IOWA



RUTH LYNN SULLIVAN,
f/k/a/ RUTH LYNN GRUWELL,

Plaintiff-Appellant/Cross-Appellee,

vs.

EUGENE CARR GRUWELL,

Defendant-Appellee/Cross-Appellant.

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Filed November 26, 1985

5-418
84-1571

Appeal from the Iowa District Court for Dallas County, Jack D. Levin,
Judge.

An appeal and cross-appeal is made from the court's disposition below of
a motion to quash and stay execution of garnishment for child support and to
modify child support. **AFFIRMED IN PART; REVERSED IN PART.**

Philip Watson, Robert L. White, and Gregory W. Peterson of Watson, White
& Peterson, P.C., Des Moines, for the plaintiff-appellant/cross-appellee.

Janice M. Becker of the Bartley Law Offices, Iowa City, for the
defendant-appellee/cross-appellant.

Heard by Oxberger, C.J., Snell, and Sackett, JJ.

An appeal and cross-appeal is made from the court's disposition below of a motion to quash and stay execution of garnishment for child support and to modify child support. We affirm the trial court in part and reverse in part.

The appellant, Ruth Sullivan, and cross-appellant, Eugene Gruwell, were divorced in February 1970. Child support of \$200 per month was ordered for the parties' three children, Dean, then aged nine, Lori, aged five, and Kelly, aged three, who were placed in their mother's custody. Eugene did not pay support until January 14, 1974. At that time Eugene was found to be in contempt by the court, but held commitment to jail would not be issued so long as Eugene would pay \$200 per month starting January 28. After the contempt hearing, Eugene and Ruth's husband, Mike, met. Ruth did not attend the meeting, but knew Mike was meeting with her ex-husband concerning child support. At that time they agreed Eugene would make payments of \$100 per month instead of \$200 per month and reduced this agreement to a writing on the back of a copy of the divorce decree. Eugene also gave Mike a check for \$500 to help pay for Dean's dental work. From that date until 1982 Eugene made support payments of \$100 per month. In 1982 he increased the payments to \$150 per month at Mike's request. In 1982 Eugene reduced his payment to \$75 per month when Lori reached the age of eighteen. Mike testified at trial the agreement was reached because he felt it was in no one's interest to place Eugene in jail where he could not make any payments. For nearly nine years Ruth has made no attempt to collect any other moneys from Eugene.

On October 31, 1983, a general execution was issued upon Ruth's request for \$21,315 in delinquent child support. In November Eugene filed a motion to quash and stay execution of garnishment of his wages. Ruth then filed an application for modification to increase the child support. After trial, the court

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determined that the child support modification should be granted and increased payment to \$300 per month for the two girls. The court sustained the motion to quash on the ground of estoppel.

Ruth has appealed, saying the court erred in granting the motion to quash and Eugene has cross-appealed, contending there was an insufficient showing of a change in circumstances to warrant the modification.

The court must find there was a substantial change in circumstances of the parties since the time of the decree which was not within the contemplation of the trial court before allowing a modification of support. Iowa Code § 598.21(8)(1985). We find ample evidence of a change in circumstances here. At the time of the divorce decree, Eugene earned \$8320 per year and at the time of the contempt hearing he had an income of about \$12,000. Since then he has received a promotion and now earns \$33,122 per year. Ruth earned \$2400 per year at the time of the decree and from October 1978 to August 1982 earned \$4680 per year. She has not worked outside of the home since August of 1982. The two youngest children have also developed an incurable disease called pancreatitis which requires constant medication. Lori entered a computer repair school and Kelly has been encouraged by her mother to enter post-high school education. All of these changes are substantial and the record supports that they were not within the contemplation of the court at the time of the decree. We disagree with Eugene that the increase is excessive.

Ruth also contends that Eugene has not shown facts sufficient to warrant a finding of estoppel in collecting the difference between what was ordered in child support and what he paid. Ruth first states that we should not entertain this argument of estoppel because it was not specifically pleaded by Eugene. She cites Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 315 (Iowa 1977) for the proposition that although an issue not pleaded but tried by consent is

ordinarily rightfully in the case, it does not apply to the defense of estoppel. The court also indicated, though, that "Our decisions have repeatedly announced that the defense of estoppel to be available must ordinarily be pleaded, unless the facts on which it arises appear on the face of the pleadings." Id. at 314. (emphasis added). Eugene's motion to quash sets forth the facts which support his theory of estoppel.

Ruth says there was no consideration for the agreement to lower child support, but consideration is not the issue in estoppel. Instead, estoppel applies "where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right." Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973)(citations omitted).

We find, however, that the doctrine of estoppel cannot prevent Ruth from collecting the unpaid child support. A review of the pertinent cases as applied to the facts of this situation shows neither waiver by the appellant nor reliance by the appellee sufficient to warrant application of the doctrine.

In Anthony, the court found that the ex-wife's failure to attempt to enforce child support payments showed waiver on her part and the husband's reliance was evidenced by the fact he did not exercise his visitation rights during this time in reliance on the bargain. Anthony, at 834. Later in the Cullinan case, estoppel was not allowed because the father had not shown he was materially prejudiced by his ex-wife's delay in asserting her rights. Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1975). Prejudice could not be found, the court stated, merely from passage of time. Id.

In Davidson v. Van Lengen, 266 N.W.2d 436 (Iowa 1978) the court discussed both these cases and indicated that laches was different from estoppel because laches required prejudice to the defendant, while estoppel did not. Id. at 439.

This, the court said, was the difference between the results in Anthony and Cullinan. It found the wife was estopped from collecting additional payments because no contempt action had ever been initiated by the wife. Id. This indicated her waiver of the right. Id. The dissent pointed out, however, that the majority also found important the fact the father had been prejudiced because he had purchased a house he would not have bought if the child support had been due, and had married and had four more children. Id. at 437, 442. (dissent by Reynoldson, Uhlenhopp, Harris, and McCormick). The dissent concluded that the reliance by defendant should be a factor in determining whether estoppel applied. Id. at 443.

In looking at both the actions of the ex-wife in this case and the reliance by defendant, we find estoppel is not supported from either viewpoint. Unlike the Davidson case, the ex-wife here did begin contempt proceedings in 1974 and garnished the ex-husband's wages in 1982. She was not inactive. Neither are we persuaded that she has shown waiver by her second husband's agreement with her ex-husband. The dissent in Davidson also noted the same situation occurred in that case and stated, "Of course, married women in Iowa have had the same right as husbands to manage their own property for at least 100 years. . . . Marriage does not install a husband as agent to bargain away his wife's property." Id. at 440. We agree and find here that the wife has not shown waiver of her right to child support.

Neither do we find sufficient reliance by the defendant. The type of reliance found sufficient in Anthony and Davidson was not exercising visitation rights, purchasing additional property, and incurring other debts and obligations as a result of the agreement to reduce or not pay child support. The defendant here has not revealed any reliance of this type on his part.

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We find the doctrine of estoppel does not apply and reverse that part of the trial court's decision which quashed the garnishment action.

In the conclusion of her brief, Ruth mentions that she should be awarded attorneys fees due from the trial court action. It has not been revealed to this court and we cannot find anywhere in the record that this issue was presented to the trial court. An issue not raised below cannot now be presented on appeal. Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980). Ruth further asks for attorneys fees on appeal. Fees may be awarded a party in connection with modification of support. Iowa Code § 598.36 (1985). Considering the results on appeal and the needs of the requesting party along with the other party's ability to pay, factors set out at In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981), we hold Eugene shall pay \$600 of Ruth's attorneys fees on appeal.

AFFIRMED IN PART; REVERSED IN PART.